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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of	
Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	CC Docket No. 94-129

COMMENTS OF
TOUCH 1, INC. AND TOUCH 1 COMMUNICATIONS, INC.

Touch 1, Inc. and Touch 1 Communications, Inc. (collectively "Touch 1"), by their attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submit their comments on the rules proposed and the issues raised in the Notice of Proposed Rule Making, FCC 94-292 ("NPRM"), issued by the Commission on November 10, 1994 in the captioned proceeding. Touch 1 agrees with the Commission that slamming cannot, and should not, be tolerated, and supports the adoption of such safeguards as are reasonably necessary to ensure that consumers are not switched from one interexchange carrier ("IXC") to another without their authority and/or knowledge. Touch 1, however, strongly encourages the Commission to carefully craft and narrowly tailor safeguards against slamming both to minimize resultant regulatory burdens and to avoid unduly hindering the ability of smaller IXCs to compete effectively. Touch 1 urges the Commission to bear in mind that any limitations on marketing inure to the benefit of large, established providers already possessed of substantial market shares.

I. INTRODUCTION

Touch 1, Inc. and Touch 1 Communications, Inc. are non-facilities-based resale carriers providing, or certified to provide, long distance telephone service to residential customers in more than 25 states. A "switchless" reseller, Touch 1 employs the transmission and switching capabilities of underlying facilities-based carriers to create "virtual networks" to serve its subscribers. Trading on its massive traffic volumes, Touch 1 is able to offer its customers residential rates equal to or lower than the lowest residential rates offered by AT&T, MCI and Sprint. Moreover, Touch 1, having identified customer satisfaction as its highest corporate priority, offers a level of residential customer service and support unsurpassed in the industry.

Touch 1 is filing comments here because its continued growth and expansion are dependent upon its ability to attract new customers. And regulations governing the manner in which consumers may be converted from one IXC to another obviously impact on that ability. As noted above, Touch 1 supports the Commission's efforts to ensure that consumers are not switched from one IXC to another unless such a conversion is both intended and authorized. Touch 1 is well aware that in the intensely competitive long distance telecommunications marketplace, fair and honest business practices by all are critical to the long term survival of the resale industry. Touch 1 submits, however, that safeguards adopted to minimize slamming should not generate unnecessary administrative and cost burdens on smaller IXCs. Touch 1 further submits that such safeguards should not hinder competition by imposing undue limits on promotional and marketing activities, thereby impeding the ability of smaller IXCs to attract new customers. Obviously a balance is required. Protections against slamming must be carefully crafted

and narrowly tailored to safeguard the consuming public without denying it any of the myriad benefits of a dynamic and competitive telecommunications marketplace.

The Commission applied these principals three years ago in crafting procedures for verification of long distance telemarketing sales.[1/] Thus, in the PIC Verification Order, the Commission stated that "[i]n considering the advisability of imposing requirements on carriers of all sizes, we seek to benefit consumers without unreasonably burdening competition in the interexchange market." Id. at ¶42. Moreover, the Commission weighed the burden on carriers of implementing additional verification procedures, emphasizing its "special concerns about potential costs imposed on smaller IXCs." Id. at ¶¶44-45. As a result, the Commission declined to adopt procedures that would have been unduly burdensome for smaller IXCs or which would have impeded the ability of such carriers to compete for new customers.[2/] Indeed, the Commission took pains to ensure that its verification procedures would "facilitate the IXCs' marketing efforts."[3/]

II. ARGUMENT

A. The Guidelines Proposed in the NPRM Regarding the Form and Content of LOAs Strike an Appropriate Balance.

Touch 1 agrees with the Commission that the requirements governing letters of agency ("LOAs") as set forth in the Commission's PIC Verification Order and Allocation

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1/ Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd 1038 (1992) ("PIC Verification Order"), recon. denied, 8 FCC Rcd 3215 (1993).

2/ Id. at ¶¶42-51; see also Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 935, 942 (1985) ("Waiver Order").

3/ PIC Verification Order at ¶48; see also Illinois Citizens Utility Board Petition for Rulemaking, 2 FCC Rcd 1726, ¶19 (1987) ("Illinois CUB Order").

Order[4/] should be codified into "one standard rule." NPRM at ¶¶8-10. Not only do LOAs provide, as pointed out by the Commission, a "useful and important consumer protection mechanism," but by minimizing slamming, LOAs help to safeguard the interests of carriers. And Touch 1 agrees that LOAs will perform these protective functions only if consumers, when they sign an LOA, are aware that they are changing their primary IXC.

Touch 1, accordingly, endorses the Commission's proposals to require that all LOAs "be printed with a type of sufficient size and readable type to be clearly legible," specify the customer's billing name and address and each covered telephone number, and confirm in "clear and unambiguous" language that (i) the customer is changing its primary IXC ("PIC") and is designating its newly-selected carrier as its agent for the PIC change, and (ii) that the customer understands that it may designate only one PIC per telephone number, that selection of multiple carriers will invalidate all PIC selections and that a PIC change may involve a charge. NPRM at ¶10. The proposed guidelines are sufficiently detailed to ensure that LOAs set forth clearly such information as is necessary to allow for informed consumer actions, without imposing on carriers unnecessary regulatory burdens. Any greater degree of specificity would disrupt this delicate balance, generating costs and administrative burdens without any offsetting benefit.

If, for example, the Commission were to prescribe language or mandate the use of a specific font or point size, carriers would be required to discard otherwise reasonable and legitimate LOAs (and the money and resources invested therein) simply because they were not crafted in the precise manner required by the Commission. More

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[4/] Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911, (1985) ("Allocation Order"), recon. denied, 102 FCC 2d 503 (1985).

importantly, if the Commission and the various state regulatory authorities were each to specify in precise detail the content and form of the LOAs that could be used in their respective jurisdictions, carriers could well be confronted with conflicting specifications. Addressing and conforming to such conflicting requirements would be costly and burdensome for carriers. Carriers, for example, could be required to employ multiple versions of LOAs or to address inconsistent requirements in single LOAs. Touch 1 thus urges the Commission not to prescribe either the text or the font or point size of LOAs, adopting instead key guidelines regarding the form and content of LOAs which would accomplish the same purpose while preserving for carriers a necessary modicum of flexibility.

Touch 1 recommends a similarly balanced approach to identification of carriers on LOAs. Touch 1 agrees with the Commission that each LOA should clearly and unambiguously identify as such the consumer's primary IXC. Touch 1, however, urges the Commission not to prohibit identification of other carriers on the LOA so long as their roles are clearly and unambiguously described. In particular, Touch 1 urges the Commission to permit, but not require, resale carriers to identify (and describe the role of) their underlying network providers on LOAs. Because some consumers, while recognizing that a resale carrier will be their primary IXC, require assurance that their calls will be routed over one or another carrier's physical network, limiting the LOA to identification of the primary IXC could impede the ability of resale carriers to compete.

B. Any Limitations on Marketing Options Should be Narrowly Tailored.

As noted above, Touch 1 supports the Commission's efforts to ensure that consumers are not switched from one IXC to another without their authority and/or

knowledge. Touch 1 further agrees with the Commission that when a consumer signs an LOA, he or she should know that as a result of that action his or her primary IXC will be changed. To the extent that the coupling of LOAs with inducements has confused or misled the consuming public, Touch 1 agrees that action should be taken to rectify this problem. The action taken should, however, be narrowly tailored in order to minimize any associated adverse impact on the ability of smaller IXCs to compete effectively.

Touch 1 is concerned that Section 64.1150's blanket prohibition on combining inducements and LOAs on the same document, as well as its identification of PIC changes as the "sole purpose" of an LOA, may unnecessarily interfere with legitimate marketing efforts to the detriment of long-distance competition. For example, a check entitling the customer to a specified amount of free long distance service for switching its primary IXC could be attached to an LOA without compromising the clear import of the LOA. Envision a document captioned in large, bold letters "An Order To Change My Long Distance Telephone Service Provider" which in addition to clearly and unambiguously confirming in large and readable type all of the information listed in Section 64.1150(d), includes at the bottom a check entitling the customer to $50 of long distance service. The customer would not be confused or misled as to the purpose of such a document. Banning it would thus serve only to deny carriers a legitimate marketing tool.

Certainly, LOAs which, through combination with inducements or otherwise, are designed to, or would, confuse or mislead, should be prohibited. This prohibition, however, need not be implemented in blunderbuss fashion, leaving in its wake a host of legitimate marketing tools. Confusing and misleading combinations, not all combinations, of LOAs and inducements should be targeted.

To this end, Touch 1 recommends that proposed Section 64.1150 be modified in two key respects. The first sentence of Section 64.1150(b) should be deleted and Section 64.1150(c) should be revised to read:

> (c) The letter of agency shall not be combined with inducements of any kind on the same document in a manner which obscures in any material way the purpose of the letter of agency to authorize an interexchange carrier to initiate a primary interexchange carrier change.

Implementation of these recommendations would prohibit marketing activities which are designed to, or would, mislead or confuse consumers without eliminating promotional efforts that would not have such an adverse impact. A more surgical approach, Touch 1's proposal would safeguard the interests of consumers and carriers alike.[5/]

Consistent with the above recommendations, Touch 1 also opposes any broad prohibition on the use of inducements in marketing long distance service or any limits on the nature of materials that can be included in a single mailing that contains an LOA. NPRM at ¶12. As the Commission has recognized, inducements can be "proper and effective marketing devices for attracting customers to an IXC's service." Inducements are commonly used in, and are a well excepted means of, mass marketing a wide variety of products and services. Inducements as a marketing tool are particularly important in more concentrated industries. Any limitation on marketing obviously inures to the benefit of large, established providers with substantial market shares. Thus in an industry in which one carrier holds a 60% market share and three carriers control more than 85%

[5/] In instances in which a carrier fails to comply with Commission guidelines or engages in slamming activities, more specific and demanding requirements can be imposed. See, e.g., Cherry Communications, Inc., 9 FCC Rcd 2086 (1994). Undue marketing restraints should not be imposed on all in order to prevent misconduct by a few.

of the market, regulations which restrict marketing flexibility should not be adopted lightly. Smaller carriers need the ability to market creatively and aggressively in order to compete with the major carriers and should not be limited in those marketing efforts unless necessary to protect consumers, and then the restrictions should be narrowly tailored.[6/]

Touch 1 also opposes limitations on a carriers' use of "800" numbers as a marketing device. NPRM at ¶19. Whether a consumer calls a carrier's "800" number to request information or to initiate a PIC change is irrelevant if he or she knowingly elects during the course of the call to initiate a PIC change. "800" numbers are one of the most widely-used and effective marketing tools available. There are few products which are not marketed today through "800" numbers. Carriers should not be denied the benefits of "800" number marketing simply because of a perceived potential for abuse. If the Commission anticipates a problem, Touch 1 submits that the preferred solution would be to apply the existing telemarketing verification procedures to "800" number sales.

[6/] In adopting "balloting" procedures nearly a decade ago, the FCC confronted an analogous situation and took care to avoid favoring the entrenched service provider:

> The BOCs through their tariffs automatically presubscribe a customer to AT&T and only change that presubscription to another carrier upon request of the customer. As a result of this "default" procedure, AT&T's customers may acquire its services by doing nothing. The other IXCs must, however, aggressively advertise in order to get their potential customers to take an affirmative action and select an IXC, This practice clearly accords AT&T preferential treatment and gives it an advantage over its competitors. The marketing advantage that AT&T enjoys is not predicated on any quality or pricing difference but rather on its historical monopoly position. [footnotes omitted].

Allocation Order at ¶22.

C. Relieving Customers of their Obligation to Pay for Long Distance Service in the Event of "Unknowing" PIC Changes is an Open Invitation for Abuse.

The Commission has requested comment on whether "any adjustments to long distance telephone charges should be made for consumers who are victims of unauthorized PIC conversions." NPRM at ¶17. Touch 1 does not oppose the imposition on carriers who "slam" consumers of the obligation to compensate them for damages suffered. Touch 1 is concerned, however, that a compensation scheme that does more than make the wronged consumer "whole" will be an open invitation to abuse.

The NPRM (at ¶17) suggests two alterative compensation schemes. The first scheme would reimburse consumers for any amounts paid for long distance telephone service over and above the amount that they would have paid but for the unauthorized PIC change. The second scheme would relieve wrongfully-converted consumers altogether of the responsibility to pay the unauthorized IXC for any long distance telephone service it provided. The first approach would make consumers whole; the second would provide them a windfall. The second approach, accordingly, would incent the unscrupulous to claim wrongful conversion in order to avoid payment of legitimate charges. The second approach would also impose undue penalties on a carrier that had converted a consumer to its service in good faith only to find that the spouse or a relative from whom it had received authority for the PIC change was not actually empowered to grant that authority. The first approach would fully compensate the consumer without providing an incentive to cheat, and would penalize the unauthorized carrier without unduly punishing carriers who are guilty of unintended unauthorized conversions.

With respect to the effect that unauthorized PIC conversions have on optional calling plans and the consumers enrolled therein, Touch 1 recommends that consumers not be relieved of their obligations under the optional calling plan in the event of an unauthorized PIC conversion, but instead suggests that the unauthorized IXC should be required to reimburse the wrongfully-converted consumer for one month's flat minimum charge. As discussed above, Touch 1 agrees that consumers should be made whole, but urges the Commission in so doing not to penalize carriers who have been victimized by the same slamming activities. Given that the consumer should become aware of any wrongful conversion within a month, reimbursement of one month's flat minimum charge should make the consumer whole. And requiring the carrier responsible for the unauthorized change to make the reimbursement focuses the penalty on the appropriate party.

III. CONCLUSION

By reason of the foregoing, Touch 1 endorses proposed Section 64.1150, as modified in a manner consistent with these Comments.

Respectfully submitted,

TOUCH 1, INC. and
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